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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 71

JUNIUS IRVING SCALES,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITIONER'S SUPPLEMENTAL BRIEF ON REARGUMENT

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INDEX

PAGE

I. Interpretation of the Membership Clause . 3

A. The Policy of Narrow Construction to Avoid Constitutional Issues 4

B. Specific Intent May Not Be Read Into the Statute by Implication 11

C. "Activity" May Not Be Read Into the Statute by Implication 18

D. The Membership Clause Should be Construed As Stated in the First Question in the Court's Order 19

II. Applicability of the "Clear and Present Danger" Standard 23

III. Constitutional Invalidity of the Membership Clause on Its Face 27

A. Invalidity Under the Fifth Amendment... 27

B. Invalidity Under the First Amendment ... 28

C. Insufficiency of the Proposed Additional Elements of "Specific Intent" and "Activity" 30

IV. "Activity" as a Requirement of Constitutional Application 34

V. Section 4(f) of the Internal Security Act as a Bar to This Prosecution 36

VI. Constitutionality of the Membership Clause as Applied In This Case 39

A. Nature of the Evidence Used to Prove Incitement 40

B. Unconstitutionally Defective Instructions to the Jury 42

PAGE

CONCLUSION 46

APPENDIX A 1a

APPENDIX B 3a

CITATIONS

CASES:

Allis v. *United States*, 155 U. S. 117 43

Baldwin v. *Franks*, 120 U. S. 678 10

Butts v. *Merchants Transportation Co.*, 230 U. S. 126 10

Chandler v. *United States*, 171 F. 2d 921 (1st Cir.) 14

Communications Assn. v. *Douds*, 339 U. S. 382 ... 6, 24, 31, 32

Communist Party of U. S. v. *Subversive Act Cont. Bd.*, 223 F. 2d 531 (D. C. Cir.) 36

Cramer v. *United States*, 325 U. S. 1 ..... 14, 15, 31

Crowell v. *Benson*, 285 U. S. 22 ..... 8, 10, 21

Dennis v. *United States*, 341 U. S. 494 ..... 7, 10, 15, 17, 23, 24, 26, 28, 29, 31, 32, 33, 35, 37, 41

DeSoto Securities Co. v. *Commissioner of Internal Revenue*, 235 F. 2d 409 (7th Cir.) 11

Fisher v. *United States*, 231 F. 2d 99 (9th Cir.) ... 18

Galvan v. *Press*, 347 U. S. 522 18

Gompers v. *Bucks Stove & Range Co.*, 221 U. S. 418 35

Greene v. *McElroy*, 360 U. S. , 79 S. Ct. 1400 .. 4

Grunewald v. *United States*, 353 U. S. 391 45

Hartzel v. *United States*, 322 U. S. 680 ..... 7, 15, 16

Heller v. *United States*, 104 F. 2d 446 (4th Cir.) .. 43

PAGE

Illinois Central Railroad v. *McKendree*, 203 U. S. 514 10

James v. *Bowman*, 190 U. S. 127 10

Kawakita v. *United States*, 343 U. S. 717 14

Kingsley Int. Pic. Corp. v. *Regents*, 360 U. S. , 79 S. Ct. 1362 29

Knights Templars' Indemnity Co. v. *Jarman*, 197 .....6, 8, 11

Labor Board v. *Jones & Laughlin*, 301 U. S. 1 5

Lanzetta v. *New Jersey*, 306 U. S. 451 .....20, 28

Masses Pub. Co. v. *Patten*, 244 Fed. 535 (S. D. N. Y. 1917) 25, 41

M'Niel v. *Holbrook*, 12 Pet. 84 44

Morissette v. *United States*, 342 U. S. 246..12, 13, 14, 18

Nudd et al. v. *Burrows, Assignee*, 91 U. S. 439 ... 43

Parsons v. *Bedford*, 3 Pet. 433 (1830) 8

Peters v. *Hobby*, 349 U. S. 331 ..... 4, 5

Schenck v. *United States*, 249 U. S. 47 .....24, 35

Schware v. *Board of Bar Examiners*, 353 U. S. 232. 17

Screws v. *United States*, 325 U. S. 91 .....7, 15, 16

Singer v. *United States*, 323 U. S. 338 .....17, 22

62 Cases of Jam v. *United States*, 340 U. S. 593 ... 11

Stilson v. *United States*, 250 U. S. 583 43

The Abby Dodge, 223 U. S. 166 8

The Employers' Liability Cases, 207 U. S. 463 ... 10

Todorow v. *United States*, 173 F. 2d 439 (9th Cir.) 43

Trade-Mark Cases, 100 U. S. 82..... 10

United States v. *Auto. Workers*, 352 U. S. 567 ... 6

United States v. *C. I. O.*, 335 U. S. 106 6

United States v. *Cohen*, 145 F. 2d 82 (2d Cir.) 43

United States v. *Delaware & Hudson Co.*, 213 U. S. 366 6

PAGE

United States v. *Dennis*, 183 F. 2d 201 (2nd Cir.) 16, 21, 24, 29, 32, 35
United States v. *Fox*, 95 U. S. 670 10
United States v. *Gambling Devices*, 346 U. S. 441 .. 10
United States v. *Harris*, 106 U. S. 629 10
United States v. *Ju Toy*, 198 U. S. 253 9
United States v. *Kirby*, 7 Wall. 482 6
United States v. *Long*, 153 F. Supp. 528 (W. D. Pa.) 43
United States v. *McElroy*, 259 F. 2d 927 (D. C. Cir.) 21
United States v. *Reese*, 92 U. S. 214 ..... 9, 10, 11
United States v. *Rumely*, 345 U. S. 41 6
United States v. *Sullivan*, 332 U. S. 689 ..... 10, 11
United States v. *Walter*, 263 U. S. 15 8
Virginia Coupon Cases, 114 U. S. 269 10
Whitney v. *California*, 274 U. S. 357 .... 28, 29, 32, 41
Williams v. *United States*, 341 U. S. 97 15
Yates v. *United States*, 354 U. S. 298 ... 7, 16, 20, 23, 24, 26, 28, 30, 31, 32, 35, 40, 46
Yu Cong Eng v. *Trinidad*, 271 U. S. 500 ..... 19, 22

CONSTITUTION OF THE UNITED STATES:

Amendment I 2, 19, 24, 25, 26, 27, 28, 31, 35, 42
Amendment V 2, 26, 27
Amendment VI 26
Amendment VII 8
Amendment XV 9

STATUTES:

Civil Rights Act 10
Corrupt Practices Act 6
Espionage Act 41
Food and Drug Act 10

PAGE

Internal Security Act (50 U. S. C. 793) . . . 32, 36, 38, 39

Interstate Commerce Act 6

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 8

Smith Act (18 U. S. C. 2385) . . . 3, 7, 12, 15, 16, 17, 21, 23, 24, 25, 26, 28, 30, 32, 35, 37, 38, 39, 40

Taft-Hartley Act 6

MISCELLANEOUS:

84 Cong. Rec. 10454 17

86 Cong. Rec. 8345, 8346 17

Ernst and Loth, *Report on the American Communist* (1952) 33

Hoover, *Masters of Deceit* (1958) 17, 33

Howe and Coser, *The American Communist Party* (1947) 33

Sayre, *Public Welfare Offenses*, 33 Col. L. Rev. 55 (1933) 12, 13

The Communist Party of the United States—A Handbook for Americans, Internal Security Subcommittee of the Senate Judiciary Comm. (84th Cong., 1st Sess., Dec. 21, 1959) 17

IN THE

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OCTOBER TERM, 1959

JUNIUS IRVING SCALES,
Petitioner,
v.
UNITED STATES OF AMERICA.

No. 8

PETITIONER'S SUPPLEMENTAL BRIEF ON REARGUMENT

By its order entered at the previous term on June 29, 1959, the Court has set this case for reargument, specifying certain questions to which, "among others," counsel are requested to address themselves.[1] The questions so specified have all been discussed, some *in extenso,* in the briefs previously filed and on argument, and the order does not request additional briefs. Nevertheless, in view of the precise and comprehensive statement of the questions listed in the order, and of the double ration of time allotted for argument, it is apparent that supplemental briefs are appropriate if not mandatory.

In the belief that the Court may be assisted by a pointed and particularized response to the order, petitioner has not undertaken a complete re-presentation of its case. Such an attempt would necessarily involve the repetition of numerous circumstances and arguments which have already been set forth as fully and clearly as counsel's talents permit, and might submerge the points which, according to the order and

[1]The order of June 29, 1959 is set forth in Appendix A, *infra* pp. 1a-2a.

the questions from the bench on argument, are now of special interest to the Court. Accordingly, petitioner continues to rely on the brief and reply brief submitted at the last term.[2]

The issues specified in the order are those which reach the validity of the indictment,[3] rather than the sufficiency of the evidence or the conduct of the trial. Petitioner believes and earnestly contends that the indictment is invalid and should be dismissed,[4] and the Court's order is itself a sufficient indication that the constitutional and statutory difficulties which the indictment presents are serious.

However, if a majority of the Court should not be persuaded that the indictment should be dismissed on one or more of the grounds covered by the Court's order, disposition of the case will turn on other issues presented in the petition. The Court's order, listing certain questions "among others" for reargument, certainly does not limit reargument to the questions listed. The nature of the evidence and the conduct of the trial raise grave constitutional issues under the First and Fifth Amendments. Accordingly, this brief is directed in part to these other issues (with particular reference to certain questions from the bench), as well as to those listed in the Court's order.

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[2]Petitioner's previous briefs will be cited herein as "Pet. Br." and "Pet. Rep. Br.", and the Government's brief as "Govt. Br." The printed record is cited as "R.", the trial transcript as "Tr.", and the Government's exhibits as "G. Ex."

[3]Except that the list does not include the issue concerning the impanelling of the grand jury, which also would go to the validity of the indictment. On this point, petitioner rests on the previous brief. Pet. Br. pp. 59-61.

[4]*Infra*, p. 46.

I. INTERPRETATION OF THE MEMBERSHIP CLAUSE.

The only reason that this case presents problems of construction of the Smith Act's membership clause[5] is that the government cannot defend its constitutionality as it is written. Therefore the government has (a) included in the indictment (R. A2) a charge of specific intent, not found in the statutory language, (b) suggested[6] that an additional requirement of "activity," not found in the statutory language, be imported as either an element of the offense or a "controlling constitutional standard," and (c) based its defense of the clause's constitutionality on other inferred qualifying adjectives ("high-level" member, "deeply conspiratorial" group, etc.)[7] not found in the statutory language.

The constitutionality of the membership clause untouched by judicial amendment is posed by the first question in the Court's order. The second and third questions ask whether the clause may "permissibly" be construed so as to add the requirements of specific intent or "activity" or both, and whether the clause would be constitutional if amended in either or both of these ways. The constitutional questions, petitioner believes, can best be re-examined after analysis of the statutory amendments which the government has moved.

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[5]The Smith Act and other pertinent statutory provisions are set out in the Appendix to petitioner's previous brief. Pet. Br. pp. 1a-9a. As a matter of convenience, the Smith Act and part of Section 4 of the Internal Security Act are reprinted in Appendix B, *infra*, pp. 3a-5a.

[6]Govt. Br. pp. 48, 51-52, and 64-68; Supplemental Memorandum for the United States on Reargument in Nos. 3 and 4, October Term 1957.

[7]Pet. Reply Br. pp. 2-4; Govt. Br. pp. 48-49, 52-53, and 56.

A. The Policy of Narrow Construction to Avoid Constitutional Issues

Most rules of statutory construction are tools for ascertaining the particular meaning of a provision by reference to its language, standing alone or in the setting of the whole statute, or, when the language does not suffice, by reference to other indicia of legislative intent, usually described as "legislative history." Whether literal or historical, these are tools for determining the *meaning*, intended or expressed, of a legislative act.

The concept of narrow construction to avoid constitutional issues is not such a tool for the discovery of meaning. Rather it is an acknowledgment that the intended or expressed meaning may, in the judicial application thereof, be altered by the extraneous pressure of constitutional factors. Essentially, therefore, this is not at all a principle of statutory construction. Rather it is a judicial policy of utilizing the permissible range (if any) of statutory interpretation in order to eliminate or alleviate constitutional difficulties.

By its very nature, the "permissible range" of statutory interpretation defies reduction to a precise judicial formula, for its metes and bounds are approached only as the individual judicial mind senses the danger of pedantic literalism or of anarchic liberalism. So, too, the range may vary as the constitutional pressure is high or low. If the difficulty is not serious, there is the less reason to approach the far end of the range; if grave, the reaction may either be to stretch the range to the uttermost, or settle back to a normal construction and face the constitutional issue.[8] In

[8]The gamut of judicial reaction may be seen in *Peters* v. *Hobby*, 349 U. S. 331 and *Greene* v. *McElroy*, 360 U. S. , 79 S. Ct. 1400. In both cases a majority of the Court, acknowledging the neighborhood of serious constitutional issues, found an avoiding

short, the "permissible range" of statutory language and the scope of general constitutional provisions (such as "due process") are both controversial imponderables, and the balance between imponderables inevitably teeters.

For all that it involves these imponderables, however, the policy of narrow construction to avoid constitutional issues is not wholly amorphous. If the cases in which the Court has applied or refused to apply the policy do not make a logical pattern, they nonetheless offer guidance in the present case.

Certain much-cited decisions may be laid to one side as inapplicable. This is not a case where the literal language of the statute (or regulation) raises no problem, and it is the government's effort to *expand* the language by inference which causes the difficulty.[9] Here it is the literal language which initially precipitates the constitutional difficulty, and the government seeks to infer additional words not to broaden the statute, but to narrow it in the hope of saving it.

Nor is this a case where there is a palpable ambiguity in the statute—a hiatus of meaning which neither the words nor the legislative history can close. That is the classic situation in which the policy of narrow construction has won general acceptance—where the language "will bear

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narrow construction within the "permissible range." In the *Peters* case, two Justices thought the narrow construction lay *beyond* the permissible range regardless of the constitutional implications, on which they made no comment. In the *Greene* case two Justices thought the narrow construction lay *within* the permissible range regardless of the constitutional implications, on which they made no comment. In the *Peters* case one Justice thought the narrow construction lay beyond the permissible range and that the statute in question was being unconstitutionally applied. In the *Greene* case one Justice thought the narrow construction lay beyond the permissible range, but that the broader construction raised no substantial constitutional issue.

[9] Such was the situation in the *Peters* and *Greene* cases, *supra* note 8. *Cf. Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 29-32.

two interpretations," both of which are "equally obvious."[10] Nor is it a case where a statute is invoked in an absurdly inappropriate situation, which the legislators could not possibly have intended to embrace.[11]

Still another group of cases that are not of much help here are those where the narrow construction involves a single word of indeterminate scope. Such problems have arisen under the "commodities clause" of the Interstate Commerce Act (whether an "interest" in a commodity includes ownership of stock in the corporation owning the commodity),[12] the Corrupt Practices Act ("expenditure"),[13] and the House Resolution establishing the Buchanan Committee (whether "lobbying" embraces the public distribution of books and pamphlets).[14] These decisions have been controversial because the narrow construction urged in aid of constitutionality has seemed, to some, to frustrate or unduly limit the scope of Congressional regulatory policy. When the statute is penal and civil rights and liberties are involved, the obvious wisdom and fairness of a rigorous construction of imprecise or many-faceted words have generally and recently commended themselves to the Court. Thus the Taft-Hartley Act concept of "belief" in violent overthrow was interpreted as meaning a belief in that goal "as an objective, not merely a prophecy." *Communications*

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[10] *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205.

[11] In *United States* v. *Kirby*, 7 Wall. 482, a mail-carrier was arrested under an indictment for murder, and those who arrested him were then indicted for obstructing the mails. Declaring that the legislature always intends such exceptions as are necessary to avoid absurd consequences, Mr. Justice Field cited Plowden's case of the prisoner who fled from a jail that was on fire, and was acquitted of jail-breaking "for W is not to be hanged because he would not stay to be burnt."

[12] *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366.

[13] *United States* v. *C. I. O.*, 335 U. S. 106 (narrow construction held within the permissible range); *United States* v. *Auto. Workers*, 352 U. S. 567 (narrow construction held beyond the permissible range).

[14] *United States* v. *Rumely*, 345 U. S. 41.

Assn v. *Douds*, 339 U. S. 382, 407. In the Smith Act itself, the words "advocate" and "organize" have been restrictively construed in *Dennis* v. *United States*, 341 U. S. 494, and *Yates* v. *United States*, 354 U. S. 298.

Closely akin to these cases are those in which the Court, to avoid constitutional doubts, has construed the word "wilfully" as requiring not merely the common law *mens rea*, but a specific intent to bring about the evil against which the statute is directed. *Hartzel* v. *United States*, 322 U. S. 680; *Dennis* v. *United States*, *supra*; *cf. Screws* v. *United States*, 325 U. S. 91. In all these cases, the Court was sharply divided on the constitutional or evidentiary *effect* of the proposed construction, rather than on the permissibility of the construction itself.

But these cases, hinging as they do on the construction of a word in the statute, do not govern the present situation.[15] The membership clause does not contain the word "wilfully," and there is no other word in the clause that can be construed to require specific intent.[16]

Much closer to the mark are the numerous cases where a federal penal or regulatory statute is cast in general, all-inclusive terms which over-lap areas within the powers vested in Congress by the Constitution and areas within the powers left to the States or expressly banned by the Constitution. Under such circumstances, may the statute be limited to the reach of Congressional power, even though there is no warrant for such a limitation in the words of the statute?

One of the earliest such cases involved the application within Louisiana of a statute directing the federal courts

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[15]The *Dennis* and *Screws* cases, *supra*, are discussed in their bearing on the specific intent issue, *infra*, pp. 14-17.

[16]The government may perhaps argue that "activity" can be derived from the word "member", but its last-taken position (Govt. Br. pp. 64-68) is to the contrary, and that "activity" is a "constitutional standard" but not an element of the offense. This point is discussed *infra*, pp. 18-19.

to follow state court practice. A Louisiana statute provided for appellate review in a manner which perhaps conflicted with the Seventh Amendment's guarantee of jury trial in suits at common law. In *Parsons* v. *Bedford*, 3 Pet. 433 (1830) the Court speaking through Mr. Justice Story, held that the general language of the federal statute might be subjected to an implied limitation so as to preclude federal judges from re-examining jury-found facts, and thus avoid constitutional doubts.[17]

Since the *Parsons* case, there have been two or three others in which the Court, to avoid constitutional doubts, has laid a drastic and unexpressed limitation on the general words of a statute.[18] Perhaps the most recent example of this sort of thing is *Crowell* v. *Benson*, 285 U. S. 22, where the Court read into the Longshoremen's and Harbor Workers' Compensation Act[19] a limitation excluding "jurisdictional facts" from the sphere of administrative finality. Mr. Justice Brandeis (with Justices Stone and Roberts) dissented, on the ground that (285 U. S. at 76-77): "The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision . . . . Neither may it do so to avoid having to resolve a constitutional doubt." To do so, the dissenters thought, would be "a remaking of the statute and not a construction of it."

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[17]Mr. Justice M'Lean dissented vigorously.

[18]E.g. *United States* v. *Walter*, 263 U. S. 15 (a statute punishing conspiracy to defraud "any corporation in which the United States . . . is a stockholder" held restricted to federal instrumentalities such as the Emergency Fleet Corporation); *The Abby Dodge*, 223 U. S. 166 (a statute regulating the sale of sponges "from the Gulf of Mexico or Straits of Florida" construed to exclude state territorial waters). The statute in *The Abby Dodge* case, referring to oceanic waters, might well be limited under the "two interpretations" rule of the *Jarman* case, *supra*, note 10. The *Walter* case approved a more radical emendation.

[19]33 U. S. C. 901-50.

But in the general stream of constitutional decision these cases are unusual. "An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains", wrote Mr. Justice Holmes in *United States* v. *Ju Toy*, 198 U. S. 253, 262, and he added: "That has been decided over and over again."

The leading decision in the line of cases to which Mr. Justice Holmes had reference is *United States* v. *Reese*, 92 U. S. 214. A statute punishing wrongful refusal to count votes was unconstitutional, unless construed as limited to a refusal based upon racial grounds, which would come within the scope of the Fifteenth Amendment. The court declined so to limit the statute by implication, and Chief Justice Waite said (92 U. S. 221):

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish . . . The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there . . . The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.
>
> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government . . .
>
> "To limit this statute in the manner now asked for would be to make new law, not to enforce an old one. This is no part of our duty."

The *Reese* case has been consistently and frequently followed, and cited and quoted with approval. In a series of cases, for example, the Court refused to confine general penal or regulatory statutes to the field of interstate commerce, despite the fatal constitutional consequences of the literal and inclusive wording. *Trade-Mark Cases,* 100 U. S. 82; *Illinois Central Railroad* v. *McKendree,* 203 U. S. 514; *The Employers' Liability Cases,* 207 U. S. 463; see also *James* v. *Bowman,* 190 U. S. 127; *Baldwin* v. *Franks,* 120 U. S. 678; *Virginia Coupon Cases,* 114 U. S. 269; *United States* v. *Harris,* 106 U. S. 629. In *United States* v. *Fox,* 95 U. S. 670 the Court declined to limit a general penal provision to acts connected with bankruptcy, despite the statutory context. In *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126, the Court declined to give the Civil Rights Act (previously held unconstitutional in the states) application in the territories.

Neither *Crowell* v. *Benson* nor the *Dennis* case appears to have marked any trend away from the rule of these numerous cases declining to save statutes by judicial amendment, for subsequent decisions have reconfirmed the Court's distrust of such techniques. In *United States* v. *Sullivan,* 332 U. S. 689, the Court declined to limit the misbranding provisions of the Food and Drug Act so as to cover only the first sale after shipment in interstate commerce, saying (332 U. S. at 693): "A restrictive interpretation should not be given a statute merely because . . . giving effect to the express language employed by Congress might require a court to face a constitutional question." In *United States* v. *Gambling Devices,* 346 U. S. 441, the Court considered an indictment under a section of the statute prohibiting interstate shipment of gambling machines which required the reporting of all sales of such devices, without reference to shipment. By the concurrence of five members, the indictment was dismissed, and three of the majority thought the

section could and should be restricted to sales in connection with interstate shipments. But neither the other two nor the four dissenters[20] would join in this construction, and the *Sullivan* case was cited as authority against the proposed judicial amendment.

It is apparent, we submit, that the policy of narrow construction to avoid constitutional issues has had and should continue to have a restricted range of application. Where there is a gap in the import of the words as in the *Jarman* case, or where a word or expression found in the statute may mean very different things to different people, the policy is a legitimate tool of judicial self-restraint. But the Court should not, and has generally refused to, escape from constitutional difficulties by the fabrication of limitations for which no basis can be found in the wording or background of the legislative act. To do so, as Chief Justice Waite remarked in the *Reese* case, *supra*, merely substitutes another constitutional difficulty for the one evaded. And, as Mr. Justice Frankfurter observed in *62 Cases of Jam* v. *United States*, 340 U. S. 593, 596:[21]

> ". . . our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

B. Specific Intent May Not Be Read Into the Statute by Implication

The second question in the Court's order concerns not the general criminal intent known to the common law as

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[20]The two other majority Justices thought the statute bad for vagueness. The four dissenters saw no constitutional defect.

[21]*Cf. DeSoto Securities Co.* v. *Commissioner of Internal Revenue*, 235 F. 2d 409 (7th Cir.), at 411: "Courts have no right, in the guise of construction of an act, to either add words to or eliminate words from the language used by congress."

mens rea, but a specific intent to overthrow the government by force and violence. As introduced in Congress, the membership clause of the bill that became the Smith Act did not expressly require *mens rea;* this element was added as a Senate amendment, by insertion of the word "knowingly."[22] The government now proposes to add by judicial amendment the requirement of specific intent, which Congress might have included but did not when the bill was considered, amended, and enacted.

The distinction between *mens rea* and specific intent is discussed in *Morissette* v. *United States,* 342 U. S. 246. Generally speaking, the common law did not require proof that the accused intended to violate the law, of which he might have been ignorant, or which he might have believed to be inapplicable or outweighed by social or ethical considerations. But the common law did require a showing that the accused had not transgressed accidentally or unconsciously, but rather with a conscious purpose to do the injurious act which the law prohibited. Since this sort of intent is a traditional element of criminal guilt, criminal statutes often do not expressly require it; nevertheless, the courts will generally assume that *mens rea* must be established, as this Court assumed in the *Morissette* case itself.

The issue was pressed in the *Morissette* case as a result of the proliferation, during the last century, of so-called "public welfare offenses," wherein the act is punishable regardless of the presence or absence of *mens rea.*[23] For example, legislatures have concluded that the public welfare requires that the sale of liquor to minors or habitual drunkards, or the sale of adulterated milk, shall be punishable even if the bartender does not know that his customer is a juvenile or a souse, and the milk distributor does not know that the farmer or middleman has watered the milk.

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[22]Pet. Br., pp. 17 and 19.

[23]Sayre, *Public Welfare Offenses,* 33 Col. L. Rev. 55 (1933).

During the early years of the century and shortly after he First World War, a number of states enacted laws unishing advocacy of anarchy or syndicalism, or member- hip in such groups.[24] Most of these statutes did not ex- ressly require *mens rea*, and in prosecutions under them the uestion repeatedly arose whether or not *scienter* was a ecessary element of the proof. The decisions were not niform, but it was generally held that *mens rea* (*scienter*) as not essential, and that the State did not have to prove, nd the accused could not defend on the ground, that he had o knowledge that the organization in question was anarchist r syndicalist in its teachings.[25]

These decisions were later sharply criticized as un- easonably harsh,[26] and it is against this background that he insertion of "knowingly" in the membership clause ecomes meaningful. Plainly, Congress wished to preserve he traditional common law intent—*mens rea, scienter*— s an element of the offense under the membership clause,[27] it is under most criminal statutes.

But this very amendment strongly indicates that the embership clause should not be construed to require spe- fic intent.[28] Except in rare instances, such intent is not

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[24]See Pet. Br. pp. 17-19.

[25]See the cases cited in Pet. Br., p. 18 note 17, and in Sayre, *op. supra*; pp. 81-82.

[26]E.g. Sayre, *loc. cit. supra.*

[27]In this context, "knowing the purpose thereof" is the same as dinary criminal intent, for the knowledge makes it clear that the fendant intended to do the prohibited act. See the *Morissette* case, *pra*, at p. 271: ". . . whether the mental element that Congress quired be spoken of as knowledge or as intent, would not seem to er its bearing on guilt."

[28]The three general categories discussed herein may be illustrated statutes punishing the sale of liquor to habitual drunkards. If the rtender serves liquor to a personable and well-behaved stranger, will not be criminally liable if the stranger is in fact an habitual unkard, unless the statute is of the "public welfare" type, in which act alone carries guilt. If the bartender is ignorant of the law, d serves a single drink to one whom he knows as a lush hoping

an element of crime,[29] and it therefore should not be implied in the absence of explicit statutory language. When Congress has wished to require a specific intent over and above *mens rea*, it has given verbal expression to that purpose. As Mr. Justice Jackson wrote in the *Morissette* case, *supra* (at pp. 264-65):

> "Congress has been alert to what often is a decisive function of some mental element in crime. . . . it has at times required a specific intent or purpose which will require some specialized knowledge or design for some evil beyond the common-law intent to do injury."

Despite these well-settled principles, the Government argues (Govt. Br. pp. 47-48) that intent should be "read into" the membership clause[30] under this Court's decision

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then to set him on the homeward path, the bartender intended to do the prohibited act, has *mens rea*, and is guilty under ordinary principles even though his intentions were kindly. Whether or not aware of the law, if the bartender intends to achieve the usual result of serving liquor to an habitual drunkard, he has "specific intent."

[29]Specific intent to betray is an element of the crime of treason. *Cramer* v. *United States*, 325 U. S. 1; *Kawakita* v. *United States*, 343 U. S. 717; *Chandler* v. *United States*, 171 F. 2d 921 (1st Cir.); see *Morissette* v. *United States*, 342 U. S. 246, 265. That is because acts wholly innocent on the face of things may be treasonable if done with intent to betray. In wartime, for example, the labor leader who calls a strike, or the military procurement official who selects one weapon in preference to another, might be lauded or damned for his decisions but, if it were shown that his decisions were prompted by communication with and bribes from the enemy, the intent to betray thus proved would make treason.

[30]The Government's brief, however, speaks of "personal intent," and of "the natural conclusion that intent is an element of the crime the statute denounces" (Govt. Br. p. 48) in a way that seems to betray a confusion between common-law intent or *mens rea* (which the membership clause expressly requires by virtue of the word "knowing," and might well be held to require even in the absence of that word), and specific intent to overthrow the government, which is a "design for some evil beyond common-law intent to do injury." Because of this confusion, most of the Government's dis-

in *Dennis* v. *United States*, 341 U. S. 494. There the charge was conspiracy to advocate violent overthrow and to organize the Communist Party as a group so advocating, in violation of the first and third paragraphs of the Smith Act. On appeal, the defendants complained of the judge's charge that specific intent to overthrow the government by force was an essential element of the crime.[31] The issue arose because of variations in the wording of the several paragraphs of the Smith Act; the first paragraph (advocacy) is qualified by the phrase "knowingly or wilfully," the second paragraph (distribution of literature) expressly requires intent to overthrow or destroy the government, and the first clause (the second clause being the membership clause itself) of the third paragraph (organizing groups) contains no express requirement of knowledge or intent. The Court held that specific intent is an essential element of the crime under the advocacy and organizing provisions, despite these variations of language.

Insofar as the Court's decision affects the advocacy paragraph which contains[32] the word "wilfully", it is in line with the *Hartzel* and *Screws* cases, *supra* (p. 7),[33] and does

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cussion of this point is wide of the mark. The single reference to *mens rea* in the Court's discussion of this point in the *Dennis* case (341 U. S. at p. 500) does *not* reflect the same confusion, for it was addueed simply to show that states of mind is customarily a ubject of inquiry in criminal trials.

[31]The defendants had in fact requested such a charge, but the Court (341 U. S. at 500 note 2) "treated this point because of the liscussion accorded it by the Court of Appeals and its importance o the administration of this statute. . . ."

[32]The word is present in the disjunctive with "knowingly," but he Court did not regard the "or" as governing, in view of its eneral approach to the statute.

[33]The Court cited (341 U. S. at p. 500) the *Screws* case, together ith *Williams* v. *United States*, 341 U. S. 97, 101-02 (following the *crews* case) and the *Cramer* case, *supra* p. 14 note 29.

On argument at the last term, Mr. Justice Frankfurter asked hether or not the *Screws* case went as far, by way of judicial amend-

not bear on the membership clause, which contains only the word "knowing." Insofar as the decision covers the organizing clause as well, the Court took the view that the organizing of a group to advocate violent overthrow, like the advocacy itself, connotes specific intent (341 U. S. at 499); "Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow."[34]

If advocating, or organizing groups to advocate, violent overthrow carries its own proof of intent to cause overthrow, then it makes little practical difference whether or not specific intent is treated as an essential element of the offense, since it is taken as proved if the other elements are proved. In the Smith Act conspiracy cases, the defendants are charged with direct complicity, as principals or conspirators, in advocating or organizing groups to advocate violence. If so much be proved, it is not unreasonable to infer specific intent as a corollary.

But this reasoning is utterly inapplicable to the membership clause, which proscribes no conduct from which such intent may be derived. See *Yates* v. *United States*, 354 U. S. 298, 331. It is directed not at action such as advocacy or organization, but at the status of "knowing" membership. Yet it is common knowledge and a matter of official cognizance that the motives for joining the Communist Party are diverse, and are often wholly unrelated to

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ment, as the Government proposes here. Of course, only four justices relied on the specific intent construction in the *Screws* case, but in any event that construction was no different from the one unanimously given to the same word in the *Hartzel* case, and neither decision seems applicable to the membership clause, which does not contain that or any comparable word. The sharp divisions within the Court in the *Screws* case related primarily to other issues.

[34] In this respect, the Court followed the reasoning of Judge Learned Hand in the court below. *United States* v. *Dennis*, 183 F. 2d 201, 214-15 (2nd Cir.).

or even inconsistent with an intent to overthrow the government by violence.[35]

Thus, the entire basis of the inference relied on in the *Dennis* case is lacking here.[36] Therefore, the words of the membership clause should be given their normal meaning, which comprehends ordinary *mens rea* but not specific intent.[37] Especially should this be so when, as here, the bill was amended so as expressly to require *scienter*, but not to require specific intent. In this particular the Smith Act was the product of long discussion and redrafting in committee[38] and, as Mr. Justice Jackson said in the *Moris-*

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[35] *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 245-46; *The Communist Party of the United States—A Handbook for Americans*; published by the Internal Security Subcommittee of the Senate Judiciary Committee (84th Cong., 1st Sess., Dec. 21, 1955) pp. 43-50 (describing, *inter alia*, Hollywood "communism with two butlers and a swimming pool"); Hoover, *Masters of Deceit* (1958) pp. 105-16. See also Pet. Br. p. 24.

[36] It should also be noted that the Smith Act debates contain several statements supporting the requirement of specific intent under the advocacy and organizing clause. 84 Cong. Rec. 10454 (Representative McCormack); 86 Cong. Rec. 8345 (Senator Danaher) and 8346 (Senator Connally: "wilfully" means with evil intent—more than "willingly"—to evade the law). There are no such indications with respect to the membership clause.

[37] Admittedly, the normal construction gives the membership clause wider scope than if restricted by specific intent. But there is absolutely no indication that this was not intended, and any argument based on harsh consequences is well answered by Mr. Justice Frankfurter's remarks (dissenting) in *Singer* v. *United States*, 323 U. S. 338, 346:

> "In the past, to soften the undue rigors of the criminal law, courts frequently employed canons of artificial construction to restrict the transparent scope of criminal statutes. I am no friend of such artificially restricted interpretations. Criminal statutes should be given the meaning that their language most obviously invites unless authoritative legislative history or absurd consequences preclude such natural meaning."

[38] According to Senator Connally, who was in charge of the bill on the Senate floor, the amended bill was the product of two weeks of work in committee, with the assistance and participation of the Solicitor-General and the Legislative Drafting Service. 86 Cong. Rec. 8345.

sette case, *supra* (p. 12), Congress has been "alert" to require specific intent expressly when such was the legislative purpose.

C. "Activity" May Not Be Read Into the Statute by Implication

The second sentence of the third question in the Court's order is whether the membership clause may permissibly be construed as requiring, as an element of the crime, proof that the accused is an "active" member of the organization in question. Petitioner does not believe that this is a permissible construction and, according to its previous brief, the government is of the same opinion.[39]

Proof of membership may, of course, involve proof of acts from which membership may be inferred. Such indicia were described in *Galvan* v. *Press*, 347 U. S. 522, 528-29, and include acts such as paying dues, attending meetings, and doing some of the work of the group. See *Fisher* v. *United States*, 231 F. 2d 99, 107 (9th Cir.).

Would proof of "active" membership require proof of more acts than are necessary to prove membership? If not, the meaning of the statute is not changed, and the insertion of the adjective would be nugatory. If so, then "membership" must be given a more restricted scope than its normal meaning carries. Certainly there is no warrant for this in the legislative history, nor has any such suggestion been advanced.

How active is "active"? Is the measure qualitative or quantitative; is it based on time consumed, or on intensity or efficacy? The trial judge regarded the matter temporally, and charged the jury (R. A41) that the test was "how much of his [the defendant's] time and efforts he

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[39]Govt. Br. p. 67. As to activity as a "controlling constitutional standard", see *infra*, pp. 34-36.

devoted to the Party." To be "active", the judge declared, "he must have devoted all, or a substantial part, of his time and efforts to the Party."

Suppose, over and above proof of membership, there is evidence of but one additional act of but a few seconds' duration, closely connected with espionage. Is this sufficient proof of "activity"? Or there may be proof of many months of work at some perhaps misguided but clearly lawful activity such as procuring signatures to the Stockholm peace appeal (*cf.* R. 186-88). Is this better proof of "activity" than a single, brief act more closely related to violence?

There is no place to turn for an answer to such questions, and this is itself strong evidence that the proposed qualifying amendment is not permissible. Surely a statute should not be strained from its natural intendment in an effort to avoid the impact of the First Amendment, only to render the statute indubitably unconstitutional for vagueness under the Fifth Amendment. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500.

This being so, it is perhaps superfluous to recall that the indictment does not charge the defendant as an "active" member. Therefore, if activity be an essential element of the crime, the indictment must be dismissed for lack of that essential element.[40]

D. The Membership Clause Should be Construed As Stated in the First Question in the Court's Order

The foregoing analysis establishes that the membership clause may not permissibly be construed as requiring either specific intent (over and above common-law *mens rea*) or "activity" as an element of the offense. There is no reason to construe it other than in accordance with the normal intendment of the words, as requiring a charge and proof

[40]Pet. Br. pp. 41-44.

that the accused was a member of a group that advocates violent overthrow of the government, including the usual proof of common-law *scienter*—to wit, knowledge that the group had the purpose of engaging in the forbidden advocacy, showing that the accused intended to join such a group.

The government has not yet undertaken to defend the constitutionality of the clause unadorned, and it should be remarked that the emendations they propose are far more drastic than anything involved in the authorities so far examined. The two additional elements described in the second and third questions in the Court's order, in conjunction, are already a double alteration. Both relate to the "member", but the government's defense of the clause is based upon still further amendments, qualifying both the "member" and the "group" of which he is a member.

In this effort, as has already been pointed out,[41] the government confuses the range of evidence in the particular case with the crime defined in the statute, as charged in the indictment. This has led the government into a defense of the clause's constitutionality based on the hypothesis that the defendant is not only an "active"" but also a "rigidly disciplined" and "high level"[42] member, and that the group not only has the proscribed purpose, but also is "tightly disciplined", "quasi-military" and "deeply conspirational."

How the statute so redrawn would look, has already been demonstrated by comparative print.[43] Attention is invited to *Lanzetta* v. *New Jersey*, 306 U. S. 451, 456,

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[41]Pet. Rep. Br. p. 3 note 6; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

[42]As to "high level", see *Yates* v. *United States*, 354 U. S. 298, 308, where it is stated that the membership clause "proscribes membership in such an organization without drawing any distinction between those holding executive office and others."

[43]Pet. Rep. Br. p. 2.

wherein Mr. Justice Butler used just such a means for his analysis of a New Jersey statute directed at any "person . . . known to be a member of any gang. . ." The New Jersey courts had upheld the constitutionality of that statute by glossing in the meaning of "member" and "gang", but this Court unanimously rejected such efforts to salvage constitutionality by extensive judicial re-writing.[44]

Insofar as the government seeks to limit "member" by such adjectives as "high level" and "rigidly disciplined", the internal evidence of the clause itself is to the contrary. Its coverage extends not only to members, but also to anyone who "affiliates with" a proscribed group, and this phrase certainly embraces a far looser relation between the accused and the group than the steel chains the government would forge.

Standing alone, the clause is not susceptible to such wholesale re-writing. In the context of the Smith Act as a whole,[45] additional and equally serious objections arise. For the progressive effect of the various limitations and qualifications proposed by the government is to make the

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[44]The opinion suggested (306 U. S. at 458) that the word "member" is itself too vague for constitutional purposes. *A fortiori*, the difficulty should not be aggravated by even vaguer qualifying adjectives such as "active."

[45]It should be noted that the "separability" clause of the Smith Act (Section 40, 54 Stat. 676) cannot be invoked to support the various limitations which the government seeks to read into the Act. Such a clause may, indeed, justify a narrow construction of the words of the statute, and rejection of "any implication" which would extend the act beyond the constitutional sphere. See *Crowell* v. *Benson*, 285 U. S. 22, 63; *United States* v. *Dennis*, 183 F. 2d at 214. But a separability clause cannot furnish the basis for adding qualifying words and phrases which are not found in the statutory language. *United States* v. *McElroy*, 259 F. 2d 927, 931-32 (D. C. Cir.). In *Crowell* v. *Benson*, *supra*, wherein the dissenting justices thought the exception for jurisdictional facts unwarranted by the language, Mr. Justice Brandeis found it unnecessary even to mention the separability clause, 33 U. S. C. 950.

membership clause a redundant duplicate of the other provisions of the Smith Act.[46]

These other sections, either expressly or by necessary implication, involve specific intent to overthrow the government by violence; the membership clause does not, so it is proposed to be added by judicial amendment. The other sections proscribe acts such as oral or written advocacy or the organization of groups; the membership clause punishes status only, but now it is suggested that "activity" be also required. The other provisions have been upheld by this Court in conspiracy cases largely on the ground that conspiratorial power creates the necessary degree of danger to established government;[47] the membership clause says nothing of conspiracy or concert of agreement or action, but now the government would have it upheld as applying to "deeply conspirational" groups.

There is no need to labor the point that such deliberately-induced redundancy violates the most elementary principles of judicial construction.[48] If petitioner's conviction is sustained on any such basis, the consequence will be that he has been convicted of conspiracy to advocate violent overthrow of the government, under a statute and an indictment which charge neither conspiracy nor advocacy.

In *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, the Court was confronted with a comparable effort to salvage a statute's constitutionality by extensive judicial reconstruction. Speaking for a unanimous court, Chief Justice Taft pointed out[49] that the Constitution requires both that the courts eschew legislative functions and that criminal statutes be

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[46]Pet. Br. pp. 30-32.

[47]Pet. Br. pp. 22-23.

[48]*Singer* v. *United States*, 323 U. S. 338, 344. The dissenting Justices did not agree that the narrower construction which they favored would create a redundancy.

[49]Pet. Rep. Br. p. 3, wherein a portion of the opinion is quoted.

easonably precise, and that the proposed interpretation of he statute was vulnerable on both scores.

So are the government's proposals in the present case. Their adoption would be sheer judicial legislation, and their ffect would be to render the membership clause redundant nd vague, and to compound the constitutional defects with which it is already afflicted.

I. APPLICABILITY OF THE "CLEAR AND PRESENT DANGER" STANDARD

The answers to the constitutional issues posed in the irst three questions in the Court's order depend in part on he answer to the fourth question, relating to what the rder describes as "the 'clear and present danger' doctrine." nitially, it is asked whether or not that doctrine applies to he membership clause at all, or applies to the "member" r the "group" or both.

As petitioner reads the government's previous briefs, he Solicitor-General treats the "clear and present danger" tandard as applicable to the membership clause, as it is to he rest of the Smith Act.[50] Petitioner is in agreement with his view and, with all respect, sees no basis in the decisions f this Court for a contrary conclusion.

It is true that in the *Dennis* case Mr. Justice Jackson roposed[51] that the "clear and present danger" standard be ised only in cases of on-the-spot agitation, incendiarism, or ivil disobedience, and be discarded in cases involving "a vell-organized, nation-wide conspiracy." But all the other nembers of the Court thought and held otherwise, deeply s they differed on the meaning and effect of applying the tandard to the Smith Act. The *Yates* case, too, implicitly

[50]Govt. Br. pp. 55 and 66 note 27.

[51]*Dennis* v. *United States*, *supra*, at pp. 567-70.

if not explicitly, utilized the standard as the basis of decision.[52]

It is also true that, in the *Dennis* case, the Court's opinion (341 U. S. at 507) described the "clear and present danger" test as inapplicable to a statute concerned not with speech but with the regulation of labor unions. *Communications Assn* v. *Douds*, 339 U. S. 382. The implications of that analysis are extensive and debatable,[53] but irrelevant here. For the Court also declared that under the charge in the *Dennis* case (341 U. S. at 508) ". . . we are squarely presented with the application of the 'clear and present danger' test, and must decide what that phrase imports."

This conclusion was rested on the Smith Act's direct impact on and restriction of speech. That impact is no less direct under the membership clause than the other provisions of the Smith Act. The difference is that here the accused's alleged connection with the forbidden advocacy is by membership in a group, whereas in the *Dennis* and *Yates* cases it was by participation in a conspiracy to advocate. This difference is enormously significant, petitioner believes, in the *result* of administering the "clear and present danger" test, but the test itself is equally applicable under the several provisions of the Act.

In answering this question in the affirmative, petitioner does not suggest that the "clear and present danger" standard is self-defining or an absolute measure, or that the test must be applied in the exact words as first written by Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, 52. The "doctrine" of "clear and present danger", if such it may be called, is simply the use of that phrase to indicate that the prohibitions of the First Amendment are not absolute, and to suggest that there is a range of necessary in-

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[52] *Yates* v. *United States*, *supra*, at pp. 318-21.

[53] *Cf. United States* v. *Dennis*, 183 F. 2d at 211-12.

quiry to determine whether a particular governmental restriction on free speech, press, or assembly may or may not be enforced. Two years before the *Schenck* decision Judge Learned Hand discussed the problem with a very parallel outlook but in altogether different verbiage. *Masses Pub. Co.* v. *Patten,* 244 Fed. 535 (S. D. N. Y. 1917). Thirty years later he undertook to particularize the meaning of "present" danger in the context of the Smith Act as applied to the leaders of the Communist Party, and restated the standard in words explicitly approved by this Court on review.[54]

Obviously, there can be no single or preclusive phrasing of the general principle of limitation on the general language of the First Amendment. But as long as the First Amendment is part of the Constitution and is treated as a substantial but not an absolute prohibition of governmental restriction of speech, there must be judicial inquiry when the courts are asked to enforce the restrictions. In saying that the "clear and present danger" standard applies to the membership clause, petitioner means that cases under that clause present constitutional issues under the First Amendment to which the Court should apply that standard, as refined and interpreted during the intervening years.

It follows (in response to the last clause of the first sentence of the Court's fourth question) that, in applying the standard under the membership clause, no line may be drawn between the "member" (or "affiliate") and the "society, group, or assembly of persons." Each of these phrases is meaningless without the other, as with the *yin* and *yang* of Chinese symbolism. An accused is not a "member" or "affiliate" *in vacuo;* he is a "member" or "affiliate" *of* a "society, group, or assembly", and these words denote an aggregation not of abstractions, but *of* "members" and "affiliates." The pinch of the statute is on the specified

[54]Pet. Br. pp. 20-22.

relationship (membership or affiliation) between the accused and the specified society, group, or assembly (one having the purpose to advocate violent overthrow of the government).

The issues under the First Amendment[55] are whether a statute condemning this relationship may be upheld on its face under the "clear and present danger" standard and, if so, whether that standard permits the statute to be applied in this case by punishing the defendant for the specific relationship made out under the indictment and on the record.

The second sentence of the Court's fourth question may refer to the *method* of resolving these issues, or to the *rightness* of the conclusion reached. With respect to the method, before the *Dennis* and *Yates* cases it was much debated whether the "clear and present danger" standard should be applied by the trial judge or by the jury, and that is one of the questions on which the Court divided in the *Dennis* case. Petitioner does not read the Court's order as reopening this problem, and the petition for certiorari did not present it for review.[56]

With respect to the conclusion reached below, of course it is petitioner's position that the "clear and present danger" test was wrongly applied. The membership clause on its face is unconstitutional under the First Amendment, and the indictment should have been dismissed. On the basis of the record, the First Amendment prohibits

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[55]These issues are not co-extensive with the entire question of the constitutionality of the membership clause as presented in this case, for there also are issues under the Fifth and Sixth Amendments. Pet. Br. 27-28, and *infra*, pp. 27-28.

[56]If, as has been consistently done under the Smith Act, the standard is to be applied by the trial judge, petitioner respectfully suggests that a written determination on the record, giving reasons, would be good practice and would facilitate appellate review. Since it is a mixed question of fact and law, appellate review should be *de novo*, as the *Dennis* case (341 U. S. at 510-11) suggests.

the enforcement of the membership clause in this case, and therefore the case should not have gone to the jury. The reasons for these conclusions have been set forth in our previous arguments on constitutionality, and are amplified hereinafter.[57]

III. CONSTITUTIONAL INVALIDITY OF THE MEMBERSHIP CLAUSE ON ITS FACE

On argument at the last term, government counsel declared that petitioner's attack on the constitutionality of the membership clause is based primarily on "guilt by association." This statement revealed a confusion of two related but distinct constitutional defects in the membership clause, which should be dissipated at the outset.

A. Invalidity Under the Fifth Amendment

The phrase "guilt by association" denotes the imputation of guilt under circumstances where the accused's connection with the proscribed conduct is so remote that it offends basic standards of fairness to hold him criminally responsible. It arises, consequently, under the due process clause of the Fifth Amendment, and has no necessary or particular connection with the First Amendment. For example, the state statutes which sought to punish "associating" with reputed burglars and thieves[58] raised no First Amendment problems in terms of free speech or press, nor would a statute imposing criminal liability on a landlord for larcenies committed by his tenants.

On this point, petitioner has little to add to the previous brief.[59] By and large, criminal statutes have been drawn in line with the familiar common-law concepts of criminal

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[57] Pet. Br. pp. 15-41; *infra*, pp. 27-34.
[58] Pet. Br. p. 30 note 38.
[59] Pet. Br. pp. 27-30.

liability for principals, accessories, and conspirators. "Membership" is not such a concept, and its outlines are vague. See *Lanzetta* v. *New Jersey*, 306 U. S. 451, 458. To impose on a "member" of a "society, group, or assembly" criminal responsibility for the acts of other members, lacking any charge of conspiracy or personal participation, would seem to tip the beam of due process and, as a distinguished lawyer has remarked,[60] to import into our law an "alien doctrine" which has not yet been recognized by this Court.

B. Invalidity Under the First Amendment

Although the taint of "guilt by association" is thus a distinct constitutional defect in the membership clause, it is nevertheless closely related to the issue under the First Amendment. For undeniably, the accused member's remoteness from the advocacy which the Smith Act proscribes renders the clause vulnerable under the "clear and present danger" test as applied in the *Dennis* and *Yates* cases. Here, again, petitioner relies primarily on the previous briefs.[61]

However, there is occasion for some further analysis of *Whitney* v. *California*, 274 U. S. 357, extensively cited in the previous briefs on both sides.[62] On argument, Mr. Justice Frankfurter suggested that the concurring opinion of Mr. Justice Brandeis was grounded on the proposition that the danger of a revolution "at some date necessarily far in the future" (274 U. S. at 379) is not sufficiently "present" to justify suppression of the advocacy, and that this proposition was repudiated by the Court in the *Dennis* case.

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[60]Pet. Br. p. note 34.

[61]Pet. Br. pp. 15-26; Pet. Rep. Br. pp. 1-2.

[62]Pet. Br. and Pet. Rep. Br. *loc. cit. supra*; Govt. Br. pp. 53-55.

It is respectfully suggested that the entire opinion does not depend or hinge on the phrase in question. Mr. Justice Brandeis discussed the case from several different standpoints in the course of the opinion's eight pages, and it is true that part of what he wrote[63] is concerned with the imminence of the danger in a temporal sense. But his opening analysis of the California anti-syndicalism statute (274 U. S. at 372-73) emphasizes a wholly different kind of remoteness: the rope of sand between the accused "member" and the proscribed advocacy. That is the same kind of remoteness from which the membership clause suffers, and Mr. Justice Brandeis sharply described the "novelty" of punishing a person not for his own acts of incitement, or for conspiracy, but merely for "becoming a member" of a society and thereby engaging in "association with those who propose to preach" the forbidden doctrine.

All of this would be directly pertinent to the present case even if, elsewhere in the opinion, the views on temporal imminence were to be regarded as obsolete. However, it is not at all clear that they are, and it is noteworthy that Mr. Justice Brandeis' opinion in the *Whitney* case was mentioned with what appears to be explicit approval in the *Dennis* case itself (341 U. S. at 507) and, very recently, in *Kingsley Int. Pic. Corp.* v. *Regents*, 360 U. S. , 79 S. Ct. 1362, 1365-66.[64]

Furthermore, there is no essential conflict between Mr. Justice Brandeis' theory of "present" danger as stated in the *Whitney* case, and the rule applied in the *Dennis* and

[63] 274 U. S. at 376-77; see also Judge Learned Hand's discussion of the *Whitney* case in *United States* v. *Dennis*, 183 F. 2d at 208-09.

[64] Mr. Justice Stewart, writing for the Court, quoted Mr. Justice Brandeis' sentences distinguishing advocacy from incitement to action, and emphasizing that suppression of speech is not the constitutionally proper way of preventing crime. Mr. Justice Frankfurter, in his concurring opinion (79 S. Ct. at 1368), spoke of "the opinions of Mr. Justice Holmes and Mr. Justice Brandeis, to whom we predominantly owe the present constitutional safeguards on behalf of freedom of expression."

Yates cases. To be sure, both of the later cases hold that there may be culpable advocacy of violent overthrow even though the prospect of actual revolution is not imminent. But the *Yates* case held that there must be something more than advocacy of revolution in the indefinite future. Such advocacy could hardly be regarded as "incitement" which, as the Court points out (354 U. S. at 320), "is usually thought of as something calculated to induce immediate action." The opinion in the *Yates* case is clear that, although the day of revolution may be distant, there must be advocacy of some kind of preparatory action in the calculable, if not the immediate future. The illustrations from the record in that case, upon which the Court relied (354 U. S. at 331-33), all involved the indoctrination or training of Party members in such things as sabotage and street fighting, or the creation of an organization to undertake (354 U. S. at 332) "tasks which would be useful when the time for violent action arrived."

But the impact of the membership clause is not on "action" of any sort. The impact is on the "member" or "affiliate" relation itself, without reference to the accused's own "actions", if any. This is precisely what Mr. Justice Brandeis described (274 U. S. at 373) as the "novelty in the prohibition" of similar provisions in the California anti-syndicalism law. In contrast, the other provisions of the Smith Act which the Court has sustained require that the accused, as principal or conspirator, be shown to have engaged in advocacy which incites to some kind of action (354 U. S. at 320) "for the forcible overthrow of the Government, and not of principles divorced from action."

C. Insufficiency of the Proposed Additional Elements of "Specific Intent" and "Activity"

The foregoing analysis establishes, petitioner submits, that neither of the judicial amendments proposed in the

second and third questions in the Court's order would significantly alter the resolution of these constitutional issues. Even if both "specific intent" and "activity" were to be added as elements of the offense, the membership clause would still be devoid of any charge of agreement between the accused and other members of the group, or of participation by the accused in the forbidden advocacy. Without these factors, the "clear and present danger" standard as developed in the *Dennis* and *Yates* cases is not met.

The crucial distinction under the First Amendment is between, on the one hand, a charge of action, advocacy of action, or conspiracy to advocate action directed toward violent overthrow, which this Court has held under the circumstances shown or assumed in the *Dennis* and *Yates* cases to constitute a "clear and present danger" even though the time of revolution is indefinite, and on the other hand the charge here of mere association through membership or affiliation with a group some of whose members may, collectively or individually, advocate violent overthrow, without any charge that the accused entered into any agreement or participated with those other members in their unlawful conduct.

Obviously, this gap may not be filled merely by an added charge of specific intent, utterly divorced from action to give practical effect to the intent. Except for the loose association denoted by "membership" or "affiliation", the parallel to the old crime of constructive treason is precise. But, as Mr. Justice Jackson observed in his concurring opinion in the *Douds* case, *supra* (339 U. S. at pp. 437-38), the Constitution "was intended to end such prosecutions", and:[65]

> "Only in the darkest periods of human history has any Western government concerned itself with mere

[65] See also *Cramer* v. *United States*, 325 U. S. 1, 20, 28-29, 61, and 69-72.

> belief, however eccentric or mischievous, when it has not matured into overt action; and if that practice survives anywhere, it is in the Communist countries, whose philosophies we loathe."

An added element of "activity" would be of even less constitutional significance. "Communists, we may assume, carry on legitimate political activities." See *Communications Assn* v. *Douds,* 339 U. S. at 393. The five *Yates* case defendants acquitted by this Court's order "had long been members, officers or functionaries of the Communist Party" (354 U. S. at 330) and, in those capacities, must surely have been exceedingly "active." Nevertheless, as the Court held, such activity makes out no case under the Smith Act because of the bar of Section 4(f) of the Internal Security Act (*Ibid.*). Nor, since these activities appeared to be "wholly lawful" (*Ibid.*), did that active Party membership and office-holding establish anything in the way of action-inciting advocacy, such as might meet the "clear and present danger" standard.

In his opinion below in the *Dennis* case, Judge Learned Hand observed (183 F. 2d at 208-09 and 212), that the justification for the requirement of "*present* danger" is that an intervening period between the advocacy of violence and the prospect of its actual use "may check its effect and change its importance", through "opportunity for the corrective of public discussion" or other circumstances.[66] Certainly the present case strikingly illustrates the practical as well as the theoretical merit of this analysis.

When there is advocacy of concrete preparatory action, it may be said (as the *Dennis* and *Yates* cases do say by implication) that there is no time for public discussion to exert its ameliorating effect, and the danger may grow to the point where repressive action comes too late. But no

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[66] Judge Hand regarded (183 F. 2d at 212) the Brandeis-Holmes concurring opinion in the *Whitney* case as based on this rationale.

such conclusion can be drawn in a prosecution under the membership clause, because there is no meaningful link between the accused and the preparatory action, and there is ample time for public discussion or the pressure of events to work on the member's state of mind, still unfocussed on unlawful individual or collective action.

Official pronouncements and the record of this trial alike indicate how effective public discussion and the course of international events have been as a "corrective" of Communist Party membership. One of the government's principal ex-Communist witnesses testified (Tr. 824-26) that the Party's greatest success in the recruitment of young people was in 1938-39, and that in later years Communist influence fell off. The Director of the Federal Bureau of Investigation has written[67] that from a peak membership of 80,000 in 1944 the Party's numerical strength has declined to 64,600 in 1945, 60,000 in 1947,[68] 43,200 in 1950, 22,600 in 1955, and a further decline in 1957.

The principal present danger, according to the Director,[69] is from the remaining handful of "hard-core" Communist "fanatics" who, it may be assumed, could be charged, like the Party leaders in the *Dennis* and other conspiracy cases, with conspiratorial incitement of action directed toward violent overthrow. But it is indeed difficult to support the notion that membership, with whatever state of mind but without such action, is a sufficient danger to warrant the suppression attempted by the membership clause.

It has been estimated that there are some 700,000 ex-Communists (of whom the accused is one)[70] in the United States today.[71] No doubt many of these are protected

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[67]Hoover, *Masters of Deceit* (1958) p. 5.
[68]*Dennis* v. *United States*, 341 U. S. at 547.
[69]Hoover, *op. cit. supra*, at pp. 4, 78, 112.
[70]Tr. 1983-84.
[71]Ernst and Loth, *Report on the American Communist* (1952) p. 14; Howe and Coser, *The American Communist Party* (1947) 528-29.

against prosecution by the statute of limitations. Be that as it may, there must be many thousands who never advocated violent overthrow or conspired to that end but who, if the membership clause is to be enforced as the government seeks to do here, will be in jeopardy of conviction for felony and up to ten years' imprisonment. Yet on this record and in the light of recent history there is no basis for finding membership in the Party (as distinguished from unlawful advocacy of concrete action) a clear and present danger to the security of the nation or any of the States.

IV. "ACTIVITY" AS A REQUIREMENT OF CONSTITUTIONAL APPLICATION

The third sentence of the third question in the Court's order asks whether, assuming that (a) "activity" is not added as an element of the offense under the membership clause, and (b) the clause is taken to be constitutionally valid on its face, a constitutional application of the membership clause depends upon a "requirement" of activity and, if so, whether the requirement was properly applied in the present case. These questions are presumably based on the Solicitor-General's contention[72] that "the 'activity' factor is a controlling constitutional standard, to be applied by the *court*, by which to test whether the membership clause has been validly applied in a particular case", and that the "activity" standard is analogous to and applicable in the same manner as the "clear and present danger" standard.

Petitioner has already presented argument against this proposal.[73] Reservation to the trial judge of the "clear and present danger" test has been upheld on the ground that

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[72]Govt. Br. pp. 64-67, based on the Supplemental Memorandum for the United States on Reargument in Nos. 3 and 4, October Term 1957.

[73]Reply Memorandum for the Petitioner on Reargument in No. 3, October Term, 1957, pp. 4-5; Pet. Br. p. 31 note 40; Pet. Rep. Br. pp. 5-6.

the test is of a mixed fact-law nature, and involves "the conflict of momentous public interests" wherein a uniformity of result unattainable through juries is desirable.[74]

The "clear and present danger" standard, therefore, unlike the evidence of an individual member's "activity", is not peculiar to or connected with the Smith Act or any other particular statute. It is a principle of limitation on the general language of the First Amendment, and in the *Schenck* case itself (249 U. S. at 52) Mr. Justice Holmes treated it as applicable to the violation of injunctions (citing *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439) as well as to statutes.

The Court's question is based on the assumption that the membership clause is valid on its face. If that assumption is to be indulged, no doubt the accused's "activity" could be taken into account, along with other circumstances shown by the evidence or judicially noticed, in determining whether or not the "clear and present danger" test is satisfied. The difficulty is that evidence of mere general "activity" such as that of the five defendants acquitted in the *Yates* case would be irrelevant to the "clear and present danger" standard, for reasons already given.[75] On the other hand, evidence of unlawful advocacy or other conduct prohibited by the other provisions of the Smith Act, would lie far outside the language of the clause (which would thus become redundant), and cause the accused's conviction, without indictment under these other provisions, on evidence relevant to them but not to the membership clause as written.

Further discussion of the point seems especially futile under the circumstances of this case, wherein the government at the trial successfully requested that the issue of activity be submitted to the jury, on appeal declared that

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[74] *Dennis* v. *United States*, 341 U. S. at 512-15; *United States* v. *Dennis*, 183 F. 2d at 215-16.

[75] *Supra*, p. 32.

the submission of this issue was "unnecessary", and now on review here states that the issue should be determined by the judge.[76] If this last-taken position is upheld, the conviction here must in any event be set aside, but petitioner earnestly hopes that the Court will find other or additional grounds for reversal.

V. SECTION 4(f) OF THE INTERNAL SECURITY ACT AS A BAR TO THIS PROSECUTION

The Court, by the fifth question in its order, has requested counsel to discuss "the relevance of the registration provisions" of the Internal Security Act to the question so posed. The registration provisions are contained in Sections 7 to 9 inclusive of that Act, 50 U. S. C. 786-88.

The registration provisions are enforceable by orders of the Subversive Activities Control Board, specifically directed to particular organizations. These orders are subject to judicial review (50 U. S. C. 793), and an order of the Board directed to the Communist Party of the United States was initially affirmed by the Court of Appeals for the District of Columbia in 1955. *Communist Party of U. S.* v. *Subversive Act. Cont. Bd.*, 223 F. 2d 531 (D. C. Cir.). Following review here and resubmission to the Board, the latest order directing the Communist Party to register was affirmed on July 30, 1959. *Communist Party of U. S.* v. *Subversive Act. Cont. Bd.*, No. 11850 in the Court of Appeals for the District of Columbia, petition for rehearing pending.

The registration requirements of the Act cover the names and addresses of officers and (in the case of Communist-action organizations) of members, and financial records. Members of Communist-action organizations must likewise register their own names (50 U. S. C. 787) in the

[76] Pet. Br. pp. 41-44; Pet. Rep. Br. p. 6; Govt. Br. p. 67.

event that the organization itself fails to register, or fails to include the member's name in its registration statement.

It is these registration provisions which raise the problem of self-incrimination that led to the inclusion of Section 4(f), which is plainly intended to prevent the legislative provisions from being thereby rendered ineffective. Whether or not Section 4(f) is sufficient for its intended purposes is an issue beyond the scope of this case. Petitioner has heretofore set forth the reasons why Section 4(f) must in any event be held to bar prosecutions of Communist members and officers under the membership clause of the Smith Act,[77] and has but a few additional observations to make at this time.

The core of the government's position[78] is that membership plus knowledge is different from "mere" membership—that the knowledge is an additional element of the offense under the membership clause that lifts it above the bar of Section 4(f). Petitioner has pointed out the absurd practical consequences of this position, under which only Communists *without* knowledge of the Party's purposes could be required to register, since only they would have immunity.[79]

But the vice of the government's position lies in the logic as well as the practical consequences of the issue. "Knowledge", as has earlier been pointed out,[80] is not really an additional element of the offense. It is nothing more than the ordinary common-law criminal intent—often called *mens rea* or *scienter*—which the courts will require to be proved under most criminal statutes, whether or not expressly required. See *Dennis* v. *United States*, 341 U. S. at 500: "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal

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[77]Pet. Br. pp. 44-50; Pet. Rep. Br. pp. 6-8.
[78]Govt. Br. pp. 68-74.
[79]Pet. Br. p. 48.
[80]*Supra*, pp. 11-13.

jurisprudence." The word "knowing" was inserted in the membership clause only to forestall the conclusion reached by some state courts under similar statutes that membership in subversive organizations should be dealt with like the sale of adulterated milk, and be made punishable even if done with innocent intention.

The government argues further that "specific intent" is an additional element, not comprehended within Section 4 (f). But this is a boot-strap proposition. If Section 4(f) would bar this prosecution in the absence of specific intent, which the membership clause does not in terms require, may the bar be avoided by adding new requirements by judicial interpretation? Surely that would be an unwarranted interference with the intention of Congress which, it is clear, was to safeguard the registration provisions of the Internal Security Act by renouncing the criminal proscription of Communist membership under the membership clause of the Smith Act.

On argument at the last term, the government made one further contention, to the effect that petitioner's argument proves too much, in that its acceptance would equally bar prosecutions of Communists under Sections 4(a) and 4(c) of the Internal Security Act itself.[81] But plainly there is no such consequence, for Sections 4(a) and 4(c) prohibit action, as described therein, apart from and independent of membership in any group. A registration statement under the registration provisions of the Act which reveals that X is a member or officer of the Communist Party, reveals the substance of the offense stated in the membership clause, and the accused's only defense (apart from the nature of the Party) would be lack of *scienter*. But an admission or disclosure of membership in a group, even in the Communist Party, does not establish any element of the

[81] These provisions are in Appendix B, *infra* p. 4a, as well as in the previous brief. Pet. Br. p. 3a.

offense stated in Section 4(a), nor any crucial part of the offense stated in Section 4(c).

In summary, the government's interpretation of Section 4(f) as covering only "mere" membership innocent of knowledge is wrong for three basic reasons. Firstly, it is confuted by the internal evidence of Section 4(f) itself, which covers office-holding as well as membership and, as the government itself elsewhere contends,[82] office-holding is itself "strong evidence" of knowledge of the Party's aims. Secondly, the government's view renders Section 4(f) meaningless for, if it applies only to membership without knowledge, there is nothing, in either the Internal Security Act or the Smith Act or any other statute, for Section 4(f) to affect. Thirdly, the government's construction flies in the face of the plain Congressional purpose, and would reduce to futility the registration provisions of the Internal Security Act.

VI. CONSTITUTIONALITY OF THE MEMBERSHIP CLAUSE AS APPLIED IN THIS CASE

The foregoing discussion of the "clear and present danger" standard relates, of course, not only to the constitutionality of the membership clause on its face, but to its constitutionality as applied in this case. That issue, petitioner hopes, has been sufficiently discussed in the previous briefs, and herein.

In the previous briefs, petitioner has also dealt with the unconstitutional result of the loose order of proof at the trial, the admission of extensive testimony and documents which were incompetent, irrelevant and prejudicial, and especially the blanket use of third party declarations with which the defendant was utterly unconnected.[83] On these matters, likewise, petitioner relies on what has already been presented.

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[82] Govt. Br. p. 85.

[83] Pet. Br. pp. 39-41, and 64-71; Pet. Rep. Br. pp. 10, 42.

A. Nature of the Evidence Used to Prove Incitement

Petitioner respectfully suggests that the government has deeply misunderstood the nature of the evidence which may constitutionally be relied on to prove incitement, within the meaning of the *Yates* case. At the trial, the government took the view that documents attacking the policies or the acts of the United States Government, and urging public protest against such policies by the written and printed word and in other ways typical of political disputation in a democratic society, constituted evidence of the sort of incitement prohibited by the Smith Act.[84] Likewise the government sought to draw support at the trial from the abusive or repellent character of various documents which were offered and received in evidence, without regard to the question whether these documents, virulent as they were in tone and verbiage, actually embodied any incitement to action.

It appears to the petitioner that this basic error has adhered to the government's case on appeal and on review in this Court. On argument at the last term, government counsel drew the Court's attention to a particular passage in the record which, according to the government, is an especially clear example of the sort of incitement punishable under the Smith Act. The passage in question was taken from a speech delivered in Chapel Hill by a Communist functionary, reading as follows (R. 390-92):

> "In Korea they are still called niggers. Niggers are courtmartialed for refusing to have their men slaughtered. Lieutenant Gilbert is one example. They say that the nigger is yellow. Yellow, give the niggers in North Carolina and Georgia rifles and tell them to fight for their rights. Yellow, man, you will see fighting like you have never seen before."

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[84] Pet. Br. pp. 33-36.

Who was the speaker inciting, and what action was he inciting them to undertake? It cannot be seriously contended that the speaker meant to incite his audience to procure "rifles" and give them to the North Carolina and Georgia "niggers". It seems clear that in this example, as in the case of the Korean war documents on the basis of which the prosecuting attorney specifically invited the jury to find incitement (R. A24), the government has overlooked the plain distinction between what is rhetorical and what is hortatory.

This vital distinction between abuse, however intemperate, of government officials and policies, as compared with actual incitement to unlawful action, was noted by Judge Learned Hand in *Masses Pub. Co.* v. *Patten*, 244 Fed. 535 (S. D. N. Y. 1917). There Judge Hand was confronted with an application for an injunction against the Postmaster to restrain him from excluding from the mails certain literature embodying what Judge Hand described (244 Fed. at 539) as "a virulent attack upon the war". Upon concluding (244 Fed. at 542) that the legal problem was the same as would have been presented by a motion to dismiss an indictment under the Espionage Act based on these documents, Judge Hand wrote (244 Fed. at 540):[85]

> "If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."

Unless this basic distinction between virulence and incitement to violence is to be observed in the enforcement of the Smith Act and other statutes restricting freedom

[85] Judge Hand's decision granting the injunction was reversed by the Circuit Court of Appeals, 246 Fed. 24. But his opinion was cited with approval by Mr. Justice Brandeis in *Whitney* v. *California*, (274 U. S. at 376), and was quoted by Mr. Justice Jackson in his concurring opinion in the *Dennis* case (341 U. S. at 571).

of expression, the protection of the First Amendment will indeed be reduced from substance to shadow. The lower court's rationalization of this sort of evidence as admissible because it "blackens the United States" (R. 480-81) is a sufficient indication of the extreme danger to freedom of expression which the petitioner's conviction entails.[86]

B. Unconstitutionally Defective Instructions to the Jury

In admitting, over petitioner's objections, the "Korean war documents" and other prejudicial but irrelevant evidence as proof of incitement, error was committed which would be fatal to petitioner's conviction even if it had not been compounded by subsequent developments at the trial. Petitioner unsuccessfully moved for a mistrial and then, seeking to mitigate the prejudicial affect of these documents, unsuccessfully requested instructions to the jury which would have clarified the essential nature of satisfactory proof of incitement by eliminating some of the evidence which was clearly irrelevant and exceedingly prejudicial.[87]

The trial judge denied this instruction on the ground (Tr. 1937) that "it in effect selects certain portions of the evidence . . . for accentuation by this Court." But the requested instruction did not seek to accentuate but to eliminate evidence which could not be validly used to establish incitement, and therefore this ground of rejection was inapplicable and erroneous.

On argument at the last term, Mr. Justice Frankfurter suggested that the court's refusal to give the requested instruction was correct unless it be the affirmative duty of a trial judge in the federal courts to assist the jury by charging not only in general terms concerning the legal issues, but by specific comment on the significance and bur-

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[86]Pet. Br. pp. 36-39; Pet. Rep. Br. pp. 4-5.
[87]Pet. Br. pp. 35-36; Pet. Rep. Br. pp. 4-5.

den of the evidence. Statements that the federal trial judge does indeed have such a duty are to be found in the decisions of this Court. In *Nudd et al.* v. *Burrows, Assignee,* 91 U. S. 426,[88] Mr. Justice Swayne wrote (91 U. S. at 439):

> ". . . it is the right and duty of the court to aid them [the jury] by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating [sic: illuminating?] the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge."

This viewpoint is, however, qualified by the principle of broad discretion in the trial judge, and it has several times been said or held that he has no affirmative duty to discuss the evidence in detail. *Stilson* v. *United States,* 250 U. S. 583, 588; *Allis* v. *United States,* 155 U. S. 117, 124; *Todorow* v. *United States,* 173 F. 2d 439, 446 (9th Cir.); *United States* v. *Long,* 153 F. Supp. 528, 531 (W. D. Pa.). In *United States* v. *Cohen,* 145 F. 2d 82 (2d Cir.) Judge Learned Hand declined to reverse a conviction on the appellant's urging that the trial judge should have discussed the facts in his charge to the jury, and said (145 F. 2d at 92):

> "Moreover, it would not have been humanly possible to do so without either making serious slips, or of seeming to favor one side or the other. It is possible that there may be judges who could safely do so—Lord Cockburn summed up the Tichbourne Case for a week or more—but it is beyond the

[88] See also *Heller* v. *United States,* 104 F. 2d 446, 450 (4th Cir.).

> powers of all but the merest few, assuming that there are any who can do it. And, whatever may be the rule across the water, in this country not only has the exercise of the power never been obligatory but the power itself has been somewhat suspect."

If Judge Hand's analysis suggests the alarming thought that juries must be entrusted with tasks which judges cannot safely attempt, it is none the less true that a trial judge's failure to comment extensively on the evidence has not often, if ever, been held in this country to constitute reversible error. But, whatever might be the preferable practice when the jury is confronted with an enormous record and complicated issues of fact to be determined under closely-reasoned principles of law, this question is not the issue presented in the present case.

For the trial judge's error below did not lie within the range of discretion. Petitioner did not request general comment on the sweep or detail of the evidence. He requested specific instructions on the legal sufficiency of certain evidence to prove the essential element of incitement by the Communist Party, and an exclusionary instruction to be applied to evidence which had been erroneously admitted for that purpose but was plainly irrelevant and improper for that purpose. (R. A-33-34). Petitioner requested an instruction that incitement could not be found on the basis of this legally insufficient evidence alone. Such instructions should certainly have been given under the rule long ago laid down by Chief Justice Taney in *M'Niel* v. *Holbrook*, 12 Pet. 84, 88:

> "The question submitted to the court was a question of law; and turned upon the legal sufficiency of evidence of a certain description, to establish a particular fact. And whether it was legally sufficient for that purpose or not; or whether the law required higher or different evidence; was a question for the court, and not for the jury."

In the present case, the law does require "different" (if not "higher") evidence of incitement from that upon which the government so heavily relied before the jury. It was the duty of the trial judge to make clear the relation between the issue and the proof, and to forestall the possibility of a conviction based on irrelevant evidence. Squarely in point is *Grunewald* v. *United States*, 353 U. S. 391, wherein the issue was whether the jury had been adequately instructed with respect to the sufficiency of certain evidence to establish a continuing conspiracy. Mr. Justice Harlan wrote (353 U. S. at 414-15):

> "We thus find that the judge's charge left it open for the jury to convict even though they found that the acts of concealment were motivated purely by the purpose of the conspirators to cover up their already accomplished crime. And this, we think, was fatal error. . . . Under such circumstances, therefore, it was essential for the judge to charge clearly and unequivocally that on these facts the jury could not infer a continuing conspiracy to conceal the conspiracy. . . . Further, it was incumbent on the judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the *taxpayers* from tax prosecution. . .".

Whatever might be urged in justification of the trial judge's initial refusal to give the charge requested below, the necessity became even greater after the prosecution's summing up, in which the jury was invited (R. A24) to examine the most repellent of the Korean war documents and find incitement to action on that basis alone. Thereafter, petitioner renewed his objection to the court's failure to give the requested charge (Tr. 2213), once more unsuccessfully. The case thus went to a jury which had been exhorted to find incitement on the sole basis of evidence which was unrelated to, and insufficient to establish, that element.

The constitutional and statutory flaw in the instructions is precisely analogous to the defect in the charge which was one of the grounds of reversal in the *Yates* case. There, the judge failed to tell the jury that certain evidence offered to prove advocacy of violent overthrow was not sufficient because the advocacy thus established was not of an "action-inciting" type. Under these circumstances, as this Court concluded, it was (354 U. S. at 325) "incumbent on the court to make clear in some fashion that the advocacy must be of action and not merely abstract doctrine." The evidence concerning the Communist Party was, as the Court later concluded, insufficient to establish that the Communist Party engaged in such advocacy, and this evidence had been presented to the jury under instructions which did not make clear its insufficiency.

CONCLUSION

As stated at the outset, petitioner has not undertaken to reargue in this brief all the points on the basis of which reversal is urged. In addition to the constitutional and statutory points directed to the validity of the indictment, petitioner believes that the serious errors in the conduct of the trial, and the insufficiency of the evidence, would in any event require reversal of the judgment of conviction.

However, petitioner has now been twice tried on the basis of an indictment challenged on grounds upon which this Court has not yet passed. Other cases under the membership clause pending here on petition for certiorari and in the lower federal courts[89] present the same basic issues of constitutionality and the legal sufficiency of the indictments. Under these circumstances, petitioner respectfully suggests that the constitutional and statutory questions should now be resolved.

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[89]Pet. Br. p. 14, footnotes 4, 5 and 6.

In conclusion, petitioner states below his answers to the questions posed in the Court's order of June 29, 1959:

Question (1).	Answer:	No.
Question (2).	Answer:	No, with respect to both sentences.
Question (3).	Answer:	No, with respect to all sentences and clauses.
Question (4).	Answer:	Yes, with respect to the first sentence. With respect to the second sentence, the "doctrine" was not properly applied in this case, but can now be by reversal of the judgment.
Question (5).	Answer:	Yes.

August 25, 1959

Respectfully submitted,

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APPENDIX A

Monday, June 29, 1959

No. 488 SCALES vs. UNITED STATES

It is ordered that this case be set for reargument at the 1959 Term to be heard on Thursday, November 19, 1959. Counsel are requested to address themselves to the following questions among others:

"(1) Is the Membership Clause of the Smith Act, 18 U. S. C. § 2385, valid under the Constitution of the United States if it be interpreted to permit a conviction based only on proof that the accused was a member of a society, group or assembly of persons described in the Act knowing the purposes thereof?

"(2) If not, is the Membership Clause constitutionally valid if interpreted as also requiring proof that the membership was accompanied by a specific intent of the accused to accomplish those purposes as speedily as circumstances would permit? Does the Smith Act permissibly bear such an interpretation?

"(3) If the Membership Clause would not be constitutionally valid as interpreted under (1) or (2), would the clause be constitutionally valid if interpreted as requiring as an element of the crime proof that the accused was an 'active' member? Does the Smith Act permissibly bear such an interpretation? If not, and if the clause be valid without such element, does a constitutional application of the Membership Clause depend upon any such requirement, and if so was such a requirement properly applied by the courts in this case?

"(4) Whether the 'clear and present danger' doctrine, as interpreted by counsel, has application

to the Membership Clause, either with respect to the accused or with respect to the 'society, group, or assembly of persons' described in the statute. If applicable, whether such doctrine was or can now be, properly applied in this case.

"(5) Is § 4(f) of the Internal Security Act, 50 USCA 780, a bar to the present prosecution? Counsel are requested to discuss the relevance of the registration provisions of that Act to this question."

Two hours are allotted to each side for oral argument.

APPENDIX B

18 U. S. C. Section 2385 (the Smith Act):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officers of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety or overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. 50 U. S. C. Section 783 (the Internal Security Act of 1950):

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

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(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.